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CIRCUIT COURT
DANE COUNTY, WI
2022CV002446

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 10

RISE, INC.,

JASON RIVERA,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION,

MARIBETH WITZEL-BEHL,
in her official capacity as City Clerk for the City of Madison, Wisconsin,

TARA McMENAMIN,
in her official capacity as City Clerk for the City of Racine, Wisconsin,

CELESTINE JEFFREYS,
in her official capacity as City Clerk for the City of Green Bay, Wisconsin,

Defendants,

WISCONSIN STATE LEGISLATURE,

Intervenor.

Declaratory Judgment
Case No. 2022CV2446
Case Code: 30701

Hon. Ryan D. Nilsestuen

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO INTERVENOR THE WISCONSIN STATE LEGISLATURE'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

An absentee ballot certificate satisfies the Wis. Stat. § 6.87(2) requirement to provide a witness "address" if it identifies a place where the witness may be communicated with. The Commission and Intervenor's more rigid three-component definition is atextual. Worse, it requires rejecting many ballot certificates that include information that, in plain and ordinary language, constitutes an "address." The Commission's representations in *League of Women Voters of Wisconsin v. Wisconsin Elections Commission*, No. 22CV2472, confirm as much—there, they take a broader view of permissible witness addresses than they do here. And the Clerk Defendants have not attempted to defend their various atextual standards for witness addresses. Plaintiffs should be granted summary judgment.

ARGUMENT

No party disputes that Plaintiffs have standing or that the Section 227.40 and 806.04 prerequisites for declaratory judgment are met. And all parties to brief summary judgment agree that the proper construction of the term "address" is a pure question of law appropriate for resolution on summary judgment. Doc. 213 at 8; Doc. 222 at 5–6; Doc. 224 at 1. The only question remaining is which construction of the key term—witness "address"—the Court should adopt. For the reasons set forth in Plaintiffs' opening brief and this reply, the Court should adopt Plaintiffs' functional construction of "address"; declare that the Section 6.87 witness-address requirement is satisfied so long as the ballot certificate sufficiently conveys a place where the witness may be communicated with; and declare invalid the Commission's three-component definition in its September 14, 2022, clerk communication.

I. Plaintiffs are entitled to summary judgment because their functional standard for a witness "address" is correct as a matter of law.

An absentee ballot certificate contains a valid witness "address" for purposes of Section 6.87 if it conveys a location where the witness may be communicated with. That construction is correct as a matter of statutory interpretation, administrable, and constitutional.

A. Plaintiffs' construction of the witness-address requirement is correct as a matter of statutory interpretation.

The parties have now briefed their respective definitions of "address" several times over. Plaintiffs will not rehash every one of those arguments. Two key points establish that Plaintiffs' definition—a place where the witness may be communicated with—is correct.

First, Plaintiffs' functional definition does not impose an artificial and atextual limit on what counts as an "address." The Commission and Intervenor's strict three-component definition does. Because Section 6.87's text does not authorize such a restriction, the three-component definition must be rejected.

The Commission and Intervenor advance an array of dictionary definitions, other statutes, and speculations about purpose that, they claim, support their three-component definition. But neither ever adequately addresses that construction's fundamental defect: It flouts Wisconsin's principal rule of statutory interpretation, that "[s]tatutory language is given its common, ordinary, and accepted meaning." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. There is no question that, in common, ordinary parlance, each of the following would be understood as a perfectly coherent, reasonable answer to the Commission's question: "What is your address?" *See* Doc. 222 at 8.

- "Same as her," when provided by a person whose cohabitant spouse, child, or parent has just answered the same question.
- "Waters Residence Hall Room 123," when provided by a university student.

- "Capitol Lakes Room 123" when provided by a resident in senior housing.

See also Doc. 213 at 12 (listing further examples). Yet application of a strict three-component definition would render all the above addresses, and many others, insufficient for purposes of Section 6.87. As a consequence, a voter whose witness provides such an address would have their ballot rejected even though the clerk would know where to contact the witness.

Nothing in the text of Section 6.87 authorizes that result. The Commission and Intervenor complain that Plaintiffs' functional definition is not in the statute, *e.g.*, Doc. 224 at 19, but their three-component definition is not in the statute either. Instead, the statute just requires a witness "address" without further qualification. Wis. Stat. § 6.87(2). The question, then, is what that unqualified term covers. In answering that question, "this Court is not free to rewrite the statute to the Government's liking." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 629 (2018) (internal quotation marks omitted); *see also United Am. v. Wis. Dep't of Transp.*, 2020 WI App 24, ¶ 16, 392 Wis. 2d 335, 944 N.W.2d 38 (Courts "may not rewrite statutes; [they] must simply interpret them as they are written."). The broad, unqualified term "address" *plainly* encompasses the situations described above and many others—*e.g.*, three-component addresses with zip code rather than municipality—beyond the Commission and Intervenor's unjustifiably rigid definition. Accordingly, Plaintiffs' functional definition of "address" is correct because it is the only definition proposed in this case that ensures that certificates with various sorts of "common, ordinary, and accepted" addresses, *see Kalal*, 2004 WI 58, ¶ 45, will not be improperly rejected.

The Commission and Intervenors' other statutory construction arguments only prove the point. Take the Commission's reliance on Section 6.34, which requires a "current and complete residential address, including a numbered street address, *if any*, and the name of a municipality." Wis. Stat. § 6.34(3)(b)(2) (emphasis added). Far from establishing that an "address" always

contains a street number, street name, and municipality, Section 6.34 illustrates, through the qualifier "if any," that sometimes even a "complete address" will lack some of those components. *See also* Doc. 213 at 14. Or consider Intervenor's preferred definition, from the Oxford English Dictionary: "the particulars of the place where a person lives . . . *typically* consisting of a number, street name, the name of a town or district." Doc. 224 at 14 (quoting *Address*, Oxford English Dictionary Online) (emphasis added). Again, there is a qualifier—"typically"—that makes clear that an "address" does not always necessarily include those three components. *See also* Doc. 213 at 11.[1] In fact, neither the Commission nor Intervenor has ever, in the course of this litigation, cited a source that states flatly that an "address" means "street name, street number, and municipality," without exception or qualification. They have not done so because they cannot—their three-component "definition" is nothing more than one particular *kind* of address.

Remarkably, the Commission's brief never once discusses situations such as university residence halls or cohabitants who use "same" as a shorthand. Instead, the Commission illustrates that Plaintiffs' argument is correct by suggesting that an unhoused person could satisfy a requirement to provide an address by designating "a park bench" they frequent as their address. Doc. 222 at 13 n.3. Plaintiffs' standard covers such cases. The Commission's does not.

Intervenor, for its part, says that witnesses who list addresses of "same," residence hall room numbers, and so on, *could have* communicated their addresses using the three-component definition. Doc. 224 at 22. Perhaps. But the point stands: the statutory text requires the witness to provide an "address," not any specific components, and those witnesses have satisfied that

[1] Further illustrating the point, Intervenor once again omits the final part of the OED definition, "and often a postal code," no doubt because it further confirms that "address" is a flexible term.

requirement. Put simply, a certificate that conveys a witness "address" cannot be rejected just because it lacks a non-statutory component which Intervenor has cherrypicked from the OED.[2]

Second, the Commission's recent representations in the consolidated case, *League of Women Voters*, confirm that Plaintiffs' definition is correct. In this case, the Commission has consistently defended the September 14 communication's strict three-component definition. *E.g.*, Doc. 222 at 8–9. But in the *League* case, the Commission has painted a strikingly different picture of what Section 6.87 requires—one that is consistent with treating all the above situations as sufficient addresses for purposes of the witness-address requirement.

For starters, in an interrogatory response in *League*, the Commission has admitted that an "absentee ballot certificate contains a witness address if the witness address field includes information from which it is *possible to determine* a street number, street name, and name of municipality for the witness." Exs. 16–25 to Aff. of Daniel S. Lenz at 71, *League*, No. 22CV2472, Doc. 116 (emphasis added). That *functional* definition covers, at a minimum, all the following situations Plaintiffs have emphasized in this case: any indication that the witness's address matches the voter's (*e.g.*, "same" or "ditto"); residence hall name and room number (*e.g.*, Waters Residence Hall Room 123); senior housing apartment name and room number (*e.g.*, Capitol Lakes Room 123); three-component addresses that substitute zip code for municipality (*e.g.*, 215 S. Hamilton 53703); and two-component addresses unique to a single municipality (*e.g.*, 23 Darn Republican St.—an address found only in Chetek). *See* Doc. 213 at 12. In each of those cases, it is "possible

[2] Intervenor further objects to Plaintiff's construction of "address" on the grounds that it is not limited to *mailing* addresses. Doc. 224 at 19–20. The Commission, by contrast, complains that Plaintiffs' construction is not limited to *residential* addresses. Doc. 222 at 10 n.2. Neither is correct. The statute *does not specify* that the address must be a mailing address or a residential address. It just requires an "address." Under settled rules of statutory interpretation, either therefore suffices.

to determine," using reliable and objective public information, the witness's street name, street number, and municipality. Street name, street number, and zip code, for instance, together necessarily convey municipality. Similarly, the Madison clerk can reliably determine that "Waters Residence Hall"—where *hundreds* of voters in her jurisdiction reside—refers to the building at 1200 Observatory Drive in Madison.

Further support for Plaintiffs' standard comes from the Commission's Materiality Provision arguments in *League*. In the summary judgment briefing there, the Commission conceded that two categories of ballot certificates satisfy Section 6.87 (presumably to avoid admitting that they violate the Materiality Provision):

- "Ballots including a street number and street name, but no municipality, but where the witness'[s] street number and street name are the same as the voter's[.]"
- "Ballots not including a street number, street name, or municipality in the witness address field, but including a notation indicating that the witness'[s] address is the same as the voter's, such as 'same,' 'ditto,' or an arrow pointing to the voter section[.]"

Combined Br. of Defs.' in Opp'n to Pls.' Mot. for Summ. J. at 17–19, *League*, No. 22CV2472, Doc. 137. It follows that *Plaintiffs'* construction of Section 6.87 is the only construction propounded in this case that covers the above situations and so avoids a Materiality Provision violation. *See* Doc. 213 at 17 (collecting preemption-avoidance cases).[3]

B. Plaintiffs' construction of the witness-address requirement is administrable.

Plaintiffs' definition of "address" is perfectly administrable. The Commission guidance that was in place from 2016 to September 2022 proves as much. *See* Doc. 4 at 5–6. That guidance required clerks to "take corrective actions in an attempt to remedy a witness address error," and

[3] The Commission inexplicably devotes six pages of its brief, Doc. 222 at 16–22, to refuting a constitutional avoidance argument Plaintiffs have not made. Plaintiffs' point in their opening brief was only that *if* Wis. Stat. § 6.84(2)'s rule of strict construction applied here—which it plainly does not—grave constitutional questions would follow. Doc. 213 at 16–17.

indicated that clerks who were "reasonably able to discern any missing information from outside sources" were "not required to contact the voter before making the correction directly to the absentee certificate envelope." *Id.* at 5. Plaintiffs are proposing nothing more onerous here.

For instance, if the Madison clerk receives a certificate listing a witness address of "Waters Residence Hall Room 123," she can simply accept the ballot, because the certificate adequately communicates where the witness may be communicated with. Or, in the unlikely event that she does not recognize "Waters Residence Hall," she can employ the same sources clerks used from 2016 to 2022 to confirm that Waters Residence Hall is the building located at 1200 Observatory Drive, Madison, and accept the ballot and certificate without further action by the voter or witness. Similarly, a clerk who receives a certificate that lists an address of "same as above" can exercise common sense to conclude that the address is the same as the voter's and accept the ballot. In all common situations, administering Plaintiffs' construction is straightforward.[4]

The Commission and Intervenor nonetheless contrive various corner cases in an attempt to manufacture an administrability problem where none exists. The Commission, for instance, suggests Plaintiffs' rule will lead to addresses such as, "The blue house with tall trees near the fire station." Doc. 222 at 8; *see also* Doc. 224 at 26–27. Even assuming witnesses are submitting such addresses—and the Commission provides no evidence that any witness has ever done so—they do not reveal an administrability problem. If the clerk can identify the location based on both the description of the house and the witness's name—which may be the case in some of Wisconsin's small municipalities—the clerk can and should accept the ballot. But if the description truly is so

[4] Intervenor's complaint that a witness might list an address of "same" when they share an apartment building but not a unit with the voter, Doc. 224 at 27, does not support its position. The same witness, in providing a three-component address, might omit an apartment number, which is not one of Intervenor's three components.

vague that the clerk does not know where to communicate with the witness, then the clerk should reject the certificate. Either way, administering Plaintiffs' standard is straightforward.

Intervenor similarly complains that administration of Plaintiffs' definition will depend on a clerk's "personal knowledge." Doc. 224 at 26. But Intervenor never explains why that is a problem. If a clerk *cannot* determine where the witness may be communicated with, then the clerk should treat the certificate as incomplete. But where the clerk knows that, for instance, a certificate listing a witness address of "Waters Residence Hall Room 123" is equivalent to "1200 Observatory Drive, Room 123, Madison, WI 53706," there is no good reason to reject the certificate and ballot. The Commission's representation in *League* that an "absentee ballot certificate contains a witness address if the witness address field includes information from which it is *possible to determine* a street number, street name, and name of municipality for the witness," *League*, No. 22CV2472, Doc. 116 at 71 (emphasis added), suggests it agrees with Plaintiffs on this point.

C. Plaintiffs' construction of the witness-address requirement is constitutional.

The Commission claims that Plaintiffs' construction of "address" would risk "potentially unconstitutionally arbitrary and disparate treatment of voters" in violation of equal protection principles. *See* Doc. 222 at 25 (citing *Bush v. Gore*, 531 U.S. 98 (2000)). Not so. *Bush* is distinct in at least three ways.

First, to the extent *Bush* announces a general equal-protection principle, it is that "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush*, 531 U.S. at 104–05. Plaintiffs' construction satisfies that principle because it creates a clear and facially uniform directive, not an arbitrary and disparate one: A clerk must accept the ballot certificate if the clerk can determine where the witness may be communicated with. That alone distinguishes *Bush*, where the Supreme Court emphasized record evidence that, for example, three different members of a *single* county

canvassing board had "applied different standards in defining a legal vote." *Id.* at 106; *see also, e.g.*, *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 407 (W.D. Pa. 2020) (rejecting a *Bush*-style equal-protection claim where Secretary of State's guidance about signature analysis was "uniform and nondiscriminatory," notwithstanding evidence of variation in how counties were applying the guidance).[5]

Second, even if a facially equal standard for witness addresses does not suffice to satisfy *Bush*, there is no reason to anticipate that Plaintiffs' standard would cause any uniformity issues in its routine application. Where, for instance, a certificate provides an address of "same," clerks will uniformly conclude that the certificate conveys that the witness shares the voter's address and so satisfies Section 6.87. Similarly, where the certificate lists a zip code in lieu of a municipality, application will be uniform because such a certificate conveys everything a clerk needs to communicate with the witness. Even if the clerk does not immediately recognize the zip code, looking up a municipality with the street name, street number, and zip code is a simple and objective task. And in rarer cases, such as university residence halls, application will still be consistent, based on broadly shared and easily ascertainable local knowledge regarding large residential housing facilities in the voting jurisdiction. All that is a far cry from *Bush*, where the closest thing to a legal standard was whether the ballot bore a "clear indication of the intent of the voter." 531 U.S. at 102. Moreover, the Commission's argument that Plaintiffs' standard inevitably leads to inconsistent application cannot be reconciled with its admission, in *League*, that a clerk should accept a certificate whenever it is "possible to determine a street number, street name, and

[5] The same reasoning refutes Intervenor's reliance on *State v. Buer*, 174 Wis. 120, 182 N.W. 855, 857 (1921)—assuming that century-old case in fact announces a general state-constitutional "perfect equality" principle, which is dubious at best.

name of municipality for the witness." *League*, No. 22CV2472, Doc. 116 at 71. In all but the most farfetched of cases, that standard is not distinct in application from what Plaintiffs propose here.

Third, Plaintiffs' standard only *enfranchises* voters—it does not, like the *Bush* "intent of the voter" standard, cause some ballots that would be counted to instead be disqualified. That feature distinguishes this case from the only case in which the Wisconsin Supreme Court has ever suggested *Bush* might apply. In *Trump v. Biden*, 2020 WI 91, ¶ 31 & n.12, 394 Wis. 2d 629, 951 N.W.2d 568, the Wisconsin Supreme Court indicated that disqualifying ballots on technical grounds "in only two of Wisconsin's 72 counties when the disputed practices were followed by hundreds of thousands of absentee voters statewide" might violate the *Bush* equal-protection principle. Plaintiffs' standard here, by contrast, will lead to more voters having their ballots counted pursuant to a uniform principle that can be administered by all Wisconsin clerks.

II. Alternatively, the Court should declare Green Bay's definition of "address" unlawful.

Green Bay Clerk Jeffreys admitted in her Answer that her office is utilizing a definition of witness "address"—street number, street name, municipality, and *either zip code or state*—that no party in this litigation has defended, including Clerk Jeffreys, who elected not to respond to Plaintiffs' motion. *See* Docs. 219–221; Doc. 213 at 7; Doc 179, ¶ 46; Doc. 160, ¶ 46. Accordingly, even if the Court declares that the three-component definition is correct, it should nonetheless declare that Green Bay's more demanding definition is unlawful. *Cf. State v. Bauer*, 2010 WI App 93, ¶ 11, 327 Wis. 2d 765, 773–74, 787 N.W.2d 412, 416 (noting that unrefuted arguments are conceded).

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment and deny the Legislature's motion for summary judgment.

DATED this 20th day of November, 2023.

Respectfully submitted,

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